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HIGH COURT DISMISSES APPEALS: FINDS THAT AIR CARGO PRICE FIXING ARRANGEMENTS INVOLVED A MARKET IN AUSTRALIA

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Legal Briefings – By **Patrick Gay** and **Asa Tan**

On 14 June 2017, the High Court of Australia unanimously dismissed the appeals by each airline in *Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2017] HCA 21.

The High Court found that price fixing agreements entered into between Air New Zealand Ltd, PT Garuda Indonesia Ltd, and other international airlines, breached Australia's competition law. As the conduct occurred between 2002 and 2006, these proceedings were brought under the former *Trade Practices Act 1974* (Cth) (**TPA**), which required that at least two parties to a price-fixing arrangement be in competition with each other in a market in Australia.

The key issue of contention was whether the conduct occurred in a market in Australia in which Air NZ and Garuda competed. Consistent with the decision of the Full Court, the High Court took an expansive view on what constitutes a market in Australia and, in this respect rejected the technical approach advocated by the airlines.

The cartel offences under the *Competition and Consumer Act 2010* (Cth) (**CCA**) no longer require that a cartel provision for goods and services supplied or acquired in a market in Australia. Nevertheless, other provisions of the CCA continue to require a competitive effect within an Australian market.

To the extent that the High Court has adopted an expansive view on what constitutes a market in Australia, the decision clarifies the application of Australian competition law prohibitions regarding goods or services supplied into or out of Australia. Businesses operating in telecommunications, transport, tourism, media, e-commerce or online in particular may be affected.

BACKGROUND

Our article on the Full Court decision and first instance decision can be accessed here. A summary of the facts are set out below.

The ACCC took action against Air NZ in 2009 and Garuda in 2010 alleging they colluded with other airlines on charges for fuel, security, insurance surcharges, and a customs fee, for the carriage of air freight from origin ports in Hong Kong (both airlines), Singapore (Air NZ) and Indonesia (Garuda) to destination ports in Australia. Air NZ and Garuda had succeeded in their defence of the ACCC's action in the Federal Court on the basis that they did not compete in a market in Australia.

The majority in the Full Court (Dowsett and Edelman JJ) held that a market is a "field of transactions" that includes both the agreement to buy and sell, and the performance of the transaction. It is the 'space' in which the competitive process takes place, and in that sense, includes all of the economic activities embodied in the concept of competition. Accordingly, while the geographic dimension of a market may in many cases determine whether a market is in Australia, regard must be had to all dimensions of the market, namely its product, geographic, functional and time dimensions.[1]

As a result of this High Court decision, the matters against Air NZ and Garuda will be remitted to the Federal Court for a hearing as to relief, including penalty.

HIGH COURT DECISION: WHEN IS A MARKET 'IN AUSTRALIA'?

The High Court unanimously dismissed the appeals by each airline and held that all aspects of the market, including the presence of customers in Australia, need to be considered in deciding whether a market is "in Australia".

In the judgment of Gordon J (that was adopted by the rest of the bench), Her Honour recognised that the identification of the market must accurately and realistically describe and reflect the commercial community involved – being the interactions between, and perceptions and actions of, the relevant actors or participants in the alleged market.[2] In the current case this included that:

1. there was an economically significant demand for the air cargo services, in the form of

demand from large shippers, and that demand physically existed in Australia;

2. the airlines met, negotiated and partnered directly with shippers in Australia;
3. the airlines tracked the shippers' activities in the market for provision of the air cargo services from Asia to Australia;
4. the airlines marketed the services to large importers in Australia (as well as to large exporters from Asia) because the airlines regarded those significant importers (and exporters) both as targets for their marketing activities and also as the ultimate source of business; and
5. the airlines designed their products according to the demand for particular scheduling, handling and storage requirements of specified shippers.

Justice Gordon stated that the above list is not exhaustive, but is sufficient to demonstrate that the airlines, as parties to the several understandings, were in competition for the supply the air cargo services in a market in Australia.[3]

In the judgment of Kiefel CJ, Bell J and Keane J, their Honours added that:

"The airlines were actively engaged in attempting to capture the demand for services emanating from shippers in Australia as an integral part of their business. The airlines' deliberate and rivalrous pursuit of orders emanating from Australian shippers was compelling evidence that they were in competition with each other in a market that was in Australia."[4]

In the judgment of Nettle J, His Honour added that:

"…. at least in those instances where Australian customers were directly involved in making the so-called switching decisions, the place of execution of those decisions could not be determinative and was no more important than the rivalrous behaviour of the airlines to which the decision-makers were subject in Australia."[5]

While apparently responding to a specific argument regarding the language in section 4E which refers to a market for goods and services "that are substitutable for, or otherwise competitive with" other goods and services, Gordon J cautioned that focusing on substitutability can obscure the proper market identification and undermine the purpose of the relevant statutory provisions. Insofar as substitution is considered a core element of the standard approach to market definition, it will be interesting to see whether or not the comments from Gordon J are picked up and expanded on in other matters where market definition is considered.[6]

Justice Gordon appears to have gone further in questioning the primacy of substitution in identifying the relevant market than the concurring opinion of Kiefel CJ, Bell J and Keane J. In their opinion, while they agree that prior decisions did not determine that substitutability is the defining feature of a market in every case, their focus appeared to be on the geographic location of the substitution and cautioning that the fact that substitution or switching may occur outside of Australia does not mean that there is no market in Australia.[7]

Justice Gordon also rejected the ACCC's suggestion that there is a two-stage approach to market definition required by section 4E. The ACCC position was that the Court was to consider the existence and scope of the market in the first instance and then separately consider whether that market was in Australia.[8] Justice Gordon correctly in our view, considered that there is a single process in identifying the relevant market.[9]

IMPLICATIONS

Although the decision on the market "in Australia" issue does not have ongoing implications for cartel offences, the Full Court and High Court decisions on the market issue does have wider implications for the 'competition tested' prohibitions in the Competition and Consumer Act.

In particular, the prohibitions against anti-competitive mergers and acquisitions (section 50), exclusive dealing (section 47) and anti-competitive contracts, arrangements or understandings (section 45) are affected. This is because these prohibitions require an effect or likely effect (or, in the case of sections 45 and 47, a purpose) of substantially lessening competition in a market in Australia.

For example, the broad approach to analysing when a market is "in Australia" requires that all economic activities in the competitive process must be taken into account. This means that markets in which international suppliers of services – such as telecommunications, transport, or media content providers, and to a lesser extent, international suppliers of goods – operate could be caught when it comes to mergers, exclusive dealing and anti-competitive arrangements.

In mergers, this may expand the scope of ACCC merger reviews in relation to trans-national supply or acquisition of goods or services.

This also may be particularly relevant in the context of online sales, where elements of the competitive process may take place both in Australia (e.g. the delivery of the relevant goods or services, or decisions regarding substitution) and in an overseas jurisdiction.

ENDNOTES

1. *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd [2016]*

FCAFC 42, at [90].

2. *Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2017] HCA 21, at [61].
3. Ibid, at [121].
4. Ibid, at [34].
5. Ibid, at [44].
6. Ibid, at [87]-[88] and [90].
7. Ibid, at [22]-[29].
8. Ibid, at [91].
9. Ibid, at [92]-[93].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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